Supreme Court, U.S.
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NO. 97-1319

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

DONNA MADDEN, WIFE OF
HENRY CASSELLI, JR.
Petitioner

versus

HENRY CASSELLI, JR.
Respondent

On Petition for Writ of Certiorari
To the 24th Judicial District Court
For the Parish of Jefferson, State of Louisiana,
The Honorable Walter J. Rothschild, Judge

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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ARGUMENT

MAY IT PLEASE THE COURT:

Mr. Casselli has not only grossly misrepresented the law to this Honorable Court, but has presented allegations as facts in direct contravention of Rule 11 of the Federal Rules of Civil Procedure and he should be sanctioned.

Mr. Casselli's entire argument is grounded primarily upon one presumed premise that is patently flawed, specifically, that it is in Marin's best interest that her father be awarded sole custody on an interim basis without a hearing. This argument ignores the very specific due process requirements of the United States Constitution.

Contrary to what Mr. Casselli would have this Honorable Court believe, Ms. Casselli respectfully declined the Fifth Circuit Court of Appeal's offer to advance the trial date herein because it sidestepped the real issue Ms. Casselli presented, the denial of her due process right to a hearing **before** being stripped of custody. An earlier trial date would have simply imposed yet another injustice, this time on both sides, as neither side has completed discovery or trial preparation. [Respondent's Opposition, p. 14, 1st Par.]. Although Ms. Casselli is grateful for the concern the Fifth Circuit Court of Appeal extended to her in its Writ Denial, an earlier trial

date would not remedy the denial of her due process right by the Trial Court in rendering its Interim Order.

THE ALLEGATIONS MR. CASSELLI PRESENTS TO THIS HONORABLE COURT AS FACTS ARE IRRELEVANT TO THE ISSUE OF THE DENIAL OF DUE PROCESS TO MS. CASSELLI AND INTERPOSED FOR AN IMPROPER PURPOSE

Ms. Casselli could easily fill ten pages with allegations about Mr. Casselli that would inflame and prejudice this Honorable Court against him in response to the five pages of allegations concerning Ms. Casselli that Mr. Casselli included solely to inflame and prejudice this Honorable Court.

However, the Trial Court did not reach its decision based upon any of Mr. Casselli's allegations because there was no hearing. The Trial Court based its decision solely upon the written recommendation of Dr. Janzen, which Ms. Casselli objected to and was specifically denied the opportunity to refute in direct contravention of Louisiana law and her Constitutional right to due process.

Indeed, if the situation were as horrible as Mr. Casselli presents to this Honorable Court, there is no doubt he would have availed himself of the provisions of Article 3945 of the Louisiana Code of Civil Procedure and applied for an emergency order of temporary custody. Mr. Casselli has never applied for an emergency order of temporary custody

simply because the facts of this case would not support this extraordinary relief.

This Honorable Court should sanction Mr. Casselli for his blatant attempt to obscure the fundamental legal issue of this case with histrionic allegations in direct contravention of Rule 11 of the Federal Rules of Civil Procedure which provides in part that

> [b]y presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief . . . it is not being presented for any improper purpose . . . .

Fed. R. Civ. P. 11 (West 1997).

THIS HONORABLE COURT HAS JURISDICTION TO REVIEW THE JUDGMENT AT ISSUE AS SPECIFICALLY PROVIDED BY 28 U.S.C. § 1257

Mr. Casselli erroneously proposes that this Honorable Court does not have jurisdiction because this Honorable Supreme Court has held that

> [t]he final judgments rule **precludes review** "where anything further remains to be determined by a State court." *Radio Station WOW v. Johnson*, 326 U.S. 120, 124, 65 S. Ct. 1475, 89 L. Ed. 569 (1945); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975).

[Respondent's Opposition, p. 10 (emphasis added)]. Mr. Casselli's quote is entirely out of context and no such final judgements rule appears in the text of either of the cases he cites.

Instead, this Honorable Court has held:

> . . . [T]he Court has recurringly encountered situations in which the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come. **There are now at least four categories of such cases in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. s 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts.** In most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and delayed justice.'

COX Broadcasting Corp. v. Cohn, 420 U.S. 469, 477-78, 95 S. Ct. 1029, 1037, 43 L. Ed.2d 328 (1975) (quoting in part Radio Station WOW v. Johnson, 326 U.S. 120, 65 S. Ct. 1475, 89 L. Ed. 569 (1945) (emphasis added)).

This Honorable Court has jurisdiction to review the

Interim Order of Trial Court under Section 1257 of Title 28 of the United States Code because Ms. Casselli has claimed a right under the United States Constitution and the Supreme Court of Louisiana, the State's highest court, has denied Ms. Casselli's Application for Supervisory Writs of Review, Certiorari, and Mandamus. Ms. Casselli's argument relies solely upon her right to due process of law under the United States Constitution and nothing further remains to be determined by a State court with respect to the Interim Order at issue.

This Honorable Court should sanction Mr. Casselli for his advocation of a legal position not warranted by existing law in direct contravention of Rule 11 of the Federal Rules of Civil Procedure which provides in part that

> [b]y presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief . . . the claims, defenses, and other legal contentions therein are warranted by existing law . . . .

Fed. R. Civ. P. 11 (West 1997).

THE TRIAL COURT IMPROPERLY RENDERED ITS INTERIM ORDER

The Interim Order at issue herein was rendered in response to Mr. Casselli's oral motion in the Judge's cham-

bers and not in open court. Ms. Casselli was denied any opportunity to contest this Interim Order. The Trial Court specifically denied Ms. Casselli's request for a hearing.

Mr. Casselli provided this quote from Black's Law Dictionary:

> A judicial proceeding, order, injunction, et cetera, is said to be *ex parte* when it is taken or granted at the instance and for the benefit of one party only, and without notice to, **or contestation by**, any person adversely interested.

Black's Law Dictionary (Emphasis Added). Ms. Casselli was specifically denied her right to contest this Interim Order.

Article 963 of the Louisiana Civil Code of Procedure which is entitled "**Ex Parte and Contradictory Motions**" states that if an order applied for by motion is

> one to which the mover is clearly entitled without supporting proof, the court may grant the order ex parte and without hearing the adverse party.

La. Code Civ. Proc. Art. 963 (West 1998). Thus, an order is ex parte if it is issued without hearing the adverse party. Because Ms. Casselli was denied a hearing before the issuance of the Interim Order, the Interim Order was ex parte under Louisiana law.

Additionally, the same Article states that if an order applied for by motion is

> one to which the mover is not clearly entitled, or which requires supporting proof, the motion **shall** be served on contradictorily with the adverse party.

La. Code Civ. Proc. Art. 963 (West 1998) (emphasis added).

Any change in custody in Louisiana requires proof by clear and convincing evidence that such an award is in the best interest of the child. Mr. Casselli's oral motion was one which required proof by clear and convincing evidence and therefore cannot be issued ex parte under Louisiana law. La. Civ. Code Art. 132 (West 1998); La. Code Civ. Proc. Art. 963.

MS. CASSELLI WAS DENIED DUE PROCESS

Marin's best interest and her parents fundamental right to due process of law are not mutually exclusive legal principles.

The fundamental right to due process of law is so critical to a determination of the best interest of a child that the Louisiana Legislature has seen fit to carefully and specifically carve only two exceptions to the this fundamental right to a hearing, Article 3945 of the Louisiana Code of Civil Procedure and The Domestic Abuse Act beginning with Section 2131 of Title 46 of the Louisiana Revised Statutes. These exceptions allow a court to render an ex parte custody

order only in extraordinary circumstances, when that order must be rendered to protect the safety of a child. A hearing must be had within 15 days to insure the best interest of the child are served by the parents fundamental right to due process of law.

Mr. Casselli would have this Honorable Court determine that the best interest of the child and her parents fundamental right to due process of law are mutually exclusive. Mr. Casselli goes so far as to suggest that a parents desire to exercise his or her fundamental right to due process of law is not in the best interest of a minor child. Yet without affording parents the fundamental right of due process of law, how is a court to determine a child's best interest, a determination of the utmost importance.

Mr. Casselli suggests to this Honorable Court that the untried opinion of a mental health professional and mere allegations suffice to strip a parent of custody, and to even question this determination is proof that a parent does not have a child's best interest at heart. Mr. Casselli then argues that all of this does not really matter because this order is only temporary, ignoring that Louisiana law provides that an order of temporary custody issued without a hearing lasts a maximum of 15 days, not five months.

Mr. Casselli proposes to this Honorable Court that it is wrong to grant Ms. Casselli a hearing before stripping her

of the joint custody of her daughter and that it is in Marin's best interest that her mother not be heard for at least five months.

Mr. Casselli proposes that a mental health professional who did not even bother to ascertain information concerning Ms. Casselli's mental health for the past year and who rendered such an inconsistent opinion (sole custody to Mr. Casselli during the school year, shared custody during the Summer; the parties cannot work together, yet the parties must work out their holiday schedule) alone and unquestioned should make this determination.

The fundamental right to due process of law is designed to protect the best interest of a child by ensuring that a determination of custody in excess of fifteen days is not made in this offhand manner. The powers of a trial court, though vast, particularly regarding the best interest of a child are never greater than the law itself and the inherent protections of that child's best interest.

Respectfully Submitted,

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